BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS DELIVERED IN THE COURTS BELOW.

The majority and dissenting opinions in the United States Circuit Court of Appeals for the Seventh Circuit are set forth verbatim in the Transcript of Record filed in this cause, on pages 102-111 thereof. They are also appended to this Brief under Appendix A.

The opinion rendered in the District Court in the form of a Memorandum appears in the Transcript of Record on pages 81-84 thereof. It is likewise appended to this Brief under Appendix B hereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked by virtue of the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; Chapter 229, 43 Stat. 936; entitled "An Act To Amend The Judicial Code, and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the Seventh Circuit on July 23, 1940, by a divided court affirmed the order or decree of the District Court of the United States, for the Northern District of Illinois, Eastern Division. (Rec. 112.) A Petition for Rehearing was filed on August 6, 1940, within the time allowed as provided

by Rule 22 of the Rules of the United States Circuit Court of Appeals, for the Seventh Circuit (Rec. 112-113); and the said Petition for Rehearing was denied on October 1, 1940. (Rec. 113.)

A certified Transcript of Record, the Petition for the issuance of a writ of certiorari herein, and the Supporting Brief annexed thereto are filed herein with the Clerk of this Court within three (3) months after denial of the said Petition for Rehearing by the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are fully set forth in the preceding Petition for writ of certiorari, under Point I thereof. In the interest of brevity, therefore, they are not repeated here. However, any necessary elaboration on the facts involved will be covered in the argument to follow.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In affirming the order or decree of the District Court of the United States, Northern District of Illinois, Eastern Division.

2. In determining that the transportation by a common carrier of its own property across state lines is to be deemed as being in interstate commerce.

3. In holding that an occupation tax levied in one state upon property destined to be taken to and used in another state is a direct burden on interstate commerce.

4. In holding that property which is part of a flow of interstate commerce may not be subjected to a non-discriminatory state occupation tax.

5. In holding that a state occupation tax measured by gross receipts from interstate commerce cannot be sustained even though the said gross receipts from interstate commerce are fairly apportioned to the commerce carried on within the taxing state.

6. In holding that a state cannot levy an occupation tax because the state of destination of the property involved may levy a compensating or use tax on the same sales transaction.

7. In adjudicating that a state may not levy an occupation tax because interstate commerce may be or is involved as an incident to the sale of the property against which the tax is levied.

8. In failing to reverse the order or decree of the District Court of the United States, Northern District of Illinois, Eastern Division.

SUMMARY OF THE ARGUMENT.

I. A completed contract of sale between residents of the State of Illinois is not a transaction in interstate commerce; and the Illinois Retailers' Occupation Tax is properly applicable thereto.

II. State taxes are not rendered invalid by the fact that they may indirectly or incidentally burden interstate commerce transactions.

III. The sales of the Debtor to the railroads would be subject to a non-discriminatory state tax such as the Illinois Retailers' Occupation Tax before interstate transportation of the materials sold to the railroads had commenced.

IV. The purchasing railroads, in transporting across state lines the materials purchased by them in the State of Illinois, were not engaged in interstate commerce.

V. Sales by the Debtor to purchasing railroads of materials to be subsequently used in interstate transportation were not exempted from a non-discriminatory state tax such as the Illinois Retailers' Occupation Tax.

VI. The Illinois Retailers' Occupation Tax Act, being a tax imposed upon those engaged in the occupation or business of selling tangible personal property for use or consumption within the State of Illinois, was not such a tax as might be imposed upon the seller or buyer by other states.

VII. The purchasing railroads acquired title to the materials within the State of Illinois and subsequently shipped the same for their own use across state lines in interstate transportation, but not in interstate commerce.

VIII. The fact that interstate transportation might have been involved as an incident to the sales by the Debtor to the purchasing railroads would not in itself invalidate the application of the Illinois Retailers' Occupation Tax Act to the said sales transactions.

ARGUMENT.

I.

The Illinois Retailers' Occupation Tax Act, effective July 1, 1933, is the State's chief source of revenue and has superseded the State property tax. It was first held constitutional in its entirety in *Reif* v. *Barrett*, 355 Ill. 104; and though subsequently thereto its constitutionality has been repeatedly attacked in the State Supreme Court, it has uniformly been upheld.

Commonly but improperly it is called a "sales tax." It is designated as: "An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption." It imposes a tax upon persons engaged in the business of selling tangible personal property at retail within the State of Illinois. (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 441.)

Section 1 of the Act defines a "sale at retail" as "any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." (1939 Illinois Revised Statutes [Bar Ass'n Ed.], Chapter 120, Par. 440.) In defining the group or class upon which the Act operates, the Illinois Supreme Court has held that "The tax involved here is an occupation tax upon a class of vendors and is measured by the gross receipts from their sales." (*Herlihy Mid-Continent Co.* v. *Nudelman*, 367 Ill. 600, 602.)

The sum and substance of the Claimant's argument is that the transactions of sale between the Debtor and the

purchasing railroads were completed within the State of Illinois. It needs no elaborate citation of authorities to sustain the proposition that transactions of this nature are not in interstate commerce. (*Schechter Poultry Corp. v. United States*, 295 U. S. 495, 542. 543; *Atlantic Coast Line R. R. v. Standard Oil Company*, 275 U. S. 257, 267; *Banker Bros. v. Pennsylvania*, 222 U. S. 210, 214.)

In view of the fact that all the sales involved in the case at bar were between an Illinois corporation (the Debtor) as the seller and railroads domiciled in the State of Illinois as the buyers, the only way in which a question of interstate commerce might be raised in these transactions is dependent on whether or not the seller was obligated to and did make delivery of the merchandise to the buyer in a foreign state. The Claimant maintains that there was no such duty or obligation on the part of the Debtor as the seller. All the Debtor was required to do was to make delivery to the local (Chicago) freight station of the railroad.

The Debtor, of course, contends that it was obligated by its contract of sale to make delivery to an out-of-state shop or office of the railroad. To support this contention, the Debtor relies on the intricacies of its transaction with the railroad. There were shipping instructions, routing instructions, provisions for a bill of lading and the issuance of a waybill.

In the face of this seemingly imposing array of evidence, at first blush it might perhaps be difficult to see why this was not a *bona fide* transaction in interstate commerce. But the Debtor fails to point out or to indicate that while it, as consignor, paid no freight for the transportation of the merchandise from Chicago to Milwaukee, the consignee (the railroad) likewise neither paid any freight nor made any freight charges on its books

or records. It may well be asked, if this shipment was handled in the same manner as any other commercial shipment, *then who did pay the freight?*

It is our understanding that the railroad, as an interstate commerce carrier, carries only for hire or compensation and operates under a standard tariff rate regulated by the Interstate Commerce Commission. Is the railroad then engaging in discriminatory rate practices? Is it applying the standard tariff rate to most shipments, while in the case at bar no charges were made for the transportation of merchandise?

However, no one appreciates any better than the railroad that it was not engaged in discriminatory rate practices. As was set forth in a short, pithy statement by the Debtor's own witness, B. B. Melgaard, the assistant purchasing agent at the Chicago office of the railroad: "That is right. We carry *our* material to our shops at Milwaukee." (Italics ours; Rec. 47.)

It is thus clearly apparent that the railroad did not function as two distinct entities—one as the buyer and the other as the carrier. The railroad acquired title and possession in Chicago, Illinois, and transported the merchandise to Milwaukee, Wisconsin, not as a common carrier for hire, *but as a buyer that happens to have the implements of carriage and employs them to transport its own property from one State to another.*

The tax in question was not levied against the railroad engaged in transporting its own property into a foreign state, but on the gross receipts realized by the Debtor on a contract of sale consummated between itself and the railroad within the State of Illinois. The movement of the property into a foreign state by the buyer's own facilities was no essential part of the sales transaction. As

this Court held in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259:

> "* * * a tax upon articles in one State that are destined for use in another State cannot be called a regulation of interstate commerce * * *."

It is therefore respectfully submitted that the tax in question is based purely on the seller's receipts from intra-state sales and does not conflict with the Commerce Clause of the Federal Constitution.

II.

State taxes that indirectly may burden interstate commerce are not necessarily invalid by virtue thereof. The underlying principle involved was concisely stated by this Court in *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, on page 395:

> "The importance of the commerce clause to the Union, of course, is very great. *But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts.*" (Italics ours.)

In *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, the Wiloil Corporation, a Pennsylvania corporation. contracted to sell liquid fuel to a Pennsylvania purchaser. The fuel was obtained from Delaware and shipped in from Delaware to the purchaser in Philadelphia. This Court in upholding the state tax on the transaction, said on page 175:

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The Act lays no burden on interstate commerce as such, and if any can be said to

result from the imposition, *it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intra-state transportation from Pennsylvania sources.*" (Italics ours.)

In *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249, this Court said on page 267 of its opinion:

> "* * * But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, *even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged.*" (Italics ours.)

Without further citations of authority, it may be conclusively stated that it is and has been the uniform policy of the Federal Courts to uphold state taxes though they may indirectly or incidentally burden interstate commerce.

III.

This Court has repeatedly affirmed the principle that where property acquires a situs within a state, either before interstate transportation has commenced or due to a break in the interstate transit, it becomes subject to the state's taxing power.

One of the earlier leading cases in which this principle became established is *Coe* v. *Errol,* 116 U. S. 517. The question therein was whether the products of a state, though intended for exportation to another state and deposited at a place of shipment for that purpose, might be taxed like other property within the state. This Court sustained the state tax, saying on page 528:

> "It is true, it was said in the case of *The Daniel Ball,* 10 Wall, 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the

> States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. *The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey.* That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." (Italics ours.)

Another case in point is *Bacon* v. *Illinois,* 227 U. S. 504. The facts indicated that a certain quantity of grain was being shipped from southern and western states to eastern states. During the process of transportation, the grain was removed from its cars in Chicago for the purpose of inspecting, grading and mixing it. The question was whether or not this grain was subject to a state property tax, due to the fact that there had been a break in transit during the interstate transportation. This Court held that the grain was so subject to a state property tax, saying on page 516:

> "He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, *there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.*" (Italics ours.)

One of the more recent cases on the subject is *Minnesota* v. *Blasius,* 290 U. S. 1. Certain cattle that had come in from outside the state were purchased by Blasius at St. Paul, Minnesota. The purchase was made on April 30, 1929, and the next day a property tax was assessed

against him for the value of the cattle. Within a few days thereafter the cattle were sold to non-resident purchasers and shipped out of the state. Here again this Court upheld the validity of the state tax, saying on page 10:

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, *it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.*" (Italics ours.)

We have cited these cases to indicate the extent to which this Court has gone to uphold the validity of state taxes, though the property subject to the tax is on the verge of being put into interstate transportation or has acquired a situs within a state due to a break in its interstate transportation.

IV.

Bearing on the issues involved in the case at bar, the question arises as to the type of transportation involved where a carrier moves its own property across state lines for its own use. Is this to be classed or considered as interstate commerce? Probably the most approved discussion of the subject is contained in *The Pipe Line Cases*, 234 U. S. 548.

It appeared therein that a group of companies, controlling pipe lines running between California and the Eastern Seaboard, had acquired a virtual monopoly on the transportation of oil through this means of conveyance. They used their monopoly to force the sale to them of all oil carried through their pipe lines. As the Court said: "They carry everybody's oil to a market although

they compel outsiders to sell it before taking it into their pipes." On page 560 of its opinion this Court said:

> "That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. * * * *The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the Act."* (Italics ours.)

We deem it important to observe the Court's language in indicating why this transportation was commerce among the states i. e., *because it began in purchase and ended in sale.* The oil companies were purchasing oil along the routes of their pipe lines, transporting the oil to eastern markets *and then selling the same.* This as the Court set forth is unquestionably transportation in interstate commerce. But we may digress to point out that in the case at bar the railroads were not making purchases for the purpose of selling the materials after the interstate transportation had ended. The railroads were making these purchases to use the materials for their own specific needs.

It is most interesting to note that in the Pipe Line Cases the Court held one of the companies, the Uncle Sam Oil Company, was not engaged in interstate commerce. We are quoting from pages 561 and 562 of the Court's opinion:

> "There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the Statute, to say that a

> man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the Act, *the transportation being merely an incident to use at the end.*" (Italics ours.)

Here then is a well defined distinction between the other oil companies involved and the Uncle Sam Oil Company. In one instance the oil companies were buying oil, transporting it across state lines and selling it at the point of final destination. But the Uncle Sam Oil Company, merely being engaged in transporting its own oil from its oil wells in Oklahoma to its refinery in Kansas, was not making such transportation in interstate commerce. By analogy with the case at bar, the railroads, in transporting the merchandise purchased from the Debtor in Chicago to their shops or offices out of the state, were not making such transportation in interstate commerce.

Another case in point is *Pennsylvania Railroad Company* v. *Public Utilities Commission of Ohio*, 298 U. S. 170. This involved a construction of the United States Commerce Act which as the Court said, "Is aimed at common carriers exclusively and not even at all these." It appeared that coal mined in Pennsylvania was carried by the owner's private facilities to its plant in Ohio where it was cleaned, broken and sorted, and from there shipped by rail to the owner's customers in Ohio. The owner contended that the transportation from Pennsylvania to Ohio was in interstate commerce. But the Court held differently, saying on page 175:

> "The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold

that this interstate transportation by an owner who does not carry for any one else will be tacked to the intra-state transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process. *The Pipe Line Cases,* 234 U. S. 548, 562; *McCluskey* v. *Marysville & Northern Ry. Co.,* 243 U. S. 36, 39, 40; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 257; *Campbell River Mills Co.* v. *Chicago, M., St. P. & P. R. Co.,* 42F (2d) 775, 777, 778; aff'd, 53F. (2d) 69, 72, 73; *Pennsylvania R. Co.* v. *McGirr's Sons Co.,* 287 Fed. 334."

The Court thus negatived the contention that where a carrier transports its own property across state lines, such transportation may be deemed as being in interstate commerce.

In *Superior Oil Company* v. *Mississippi,* 280 U. S. 390, the facts indicated that the Oil Company, a Mississippi corporation, sold gasoline to packers within the state and delivered it at the packers' wharves. The packers loaded the fuel on their own boats and sent it to Louisiana where it was delivered to fishermen for use in fishing. The fishermen brought their catch back to Mississippi, sold it to the packers and were charged with the cost of the fuel. The Oil Company received from the packers a bill of lading signed by the Master of the Boat on which the fuel was loaded and reading in part: "Consigned to Gussie Fountaine Pkg. Company. Destination: Grant's Pass, Louisiana."

In deciding that the State of Mississippi could assess a tax against the Superior Oil Company on the fuel so sold, the Court said on page 394:

"The seller, of course, paid no freight. The document seems to have had no other use then, as the Supreme Court of Mississippi said, to try to convert

> a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. *The goods were delivered to the so-called consignee before they started, and were in its hands throughout.*" (Italics ours.)

Reading further, the Court held on page 395:

> "* * * *But here the gasoline was in the hands of the purchaser to do with it as it liked,* and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. * * * The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana and hoped not to be in Mississippi." (Italics ours.)

Unquestionably there is an analogy between these cases and the case at bar. In each instance the carriers received the property from the seller within the state and then transported it across state lines for their own use. Such transportation cannot be deemed as being in interstate commerce.

V.

We may inquire into the effect of state taxation on property that is either purchased or stored within a state for use by a carrier in interstate transportation. An example of this is the case of *Eastern Air Trans. Inc.* v. *South Carolina Tax Commission*, 285 U. S. 147. The Transport Company, a Delaware corporation, operated airplanes in interstate commerce across the state of South Carolina. Its entire business was interstate in character and it purchased gasoline in South Carolina for its planes. The seller added to the price of the gasoline sold to the Transport Company the amount of the state gasoline tax. The Transport Company contended that this gasoline tax placed a direct burden on interstate commerce and was

therefore repugnant to the Commerce Clause of the Federal Constitution. This Court refused to sustain this contention, saying on page 153 of its opinion:

> "*But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the state upon intrastate dealers.* There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A nondiscriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." (Italics ours.)

Along the same line is the case of *Edelman* v. *Boeing Air Trans. Inc.,* 289 U. S. 249. Therein the Transport Company, also engaged in interstate commerce, was taxed by the state on gasoline withdrawn from its storage tanks and placed in its planes. No tax was collected for the gasoline consumed in the Transport Company's planes, but it was only at the time that the gasoline was withdrawn from storage for use that the tax was applied. Here again the Supreme Court upheld the validity of the state tax, saying in its opinion on page 252:

> "A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, *notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce.* Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga &*

St. Louis Ry. v. *Wallace,* 288 U. S. 249." (Italics ours.)

We may also again cite *Nashville, Chattanooga and St. L. Ry.* v. *Wallace,* 288 U. S. 249. The facts therein indicated that the Railroad, an interstate carrier, purchased gasoline outside of the State of Tennessee, but which was stored in the railroad's storage tanks within the State of Tennessee. None of the gasoline was sold but it was all withdrawn and used by the railroad to furnish motor power for its interstate operations. The railroad contended that the state tax imposed "on persons and corporations engaged in or carrying on the business of selling, or storing, or distributing gasoline" infringed on and interfered with the railroad's interstate transportation, and was therefor a burden on interstate commerce. But the Supreme Court refused to sustain this contention, saying on page 267:

> "We cannot say that the tax is a forbidden burden on interstate commerce because Appellant uses the gasoline, subsequent to the incidence of the tax as an instrument of interstate commerce."

These cases go beyond the principle propounded in the Pipe Lines Cases. They hold conclusively that there is nothing repugnant to the Commerce Clause of the Federal Constitution in a state tax on the purchase or storage of supplies used by a carrier in interstate transportation.

Here then is another line of cases analogous to the one at bar. The railroads, after acquiring the property from the Debtor, may subsequently use this merchandise in interstate *transportation,* but that does not make it interstate commerce. As the Court said in *Pennsylvania Railroad Co.* v. *Public Utilities Commission of Ohio,* 289 U. S. 170, on pages 173, 174:

"Appellants say that from the moment the coal

left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any state of ensuing transit. *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U. S. 166, 173; *Ohio Railroad Comm'n* v. *Worthington*, 255 U. S. 101, 108; *Federal Trade Comm'n* v. *Pacific States Paper Ass'n*, 273 U. S. 52, 64. *But there is confusion of thought in such a statement of the problem. Not all commerce is transportation*, and not all transportation is by common carriers by rail." (Italics ours.)

In the case at bar the subsequent use of the property by the railroads in interstate transportation cannot by any means be considered as being in interstate commerce.

VI.

Up to this point we have discussed the question from the point of view that state taxation is invalid if it directly burdens interstate commerce. But even this principle is not rigid, but on the contrary is subject to qualification. As this Court point out, "Even interstate business must pay its way." (*Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252.)

In *Western Live Stock* v. *Bureau*, 303 U. S. 250, the Court said on page 254:

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. * * * *and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business.*" (Italics ours.)

In the same case the Court stated on pages 255, 256:

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Continuing on page 256, the Court said:

> "Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, *Wisconsin & M. Ry. Co.* v. *Powers,* 191 U. S. 379; *Maine* v. *Grand Trunk Ry. Co., supra; Cudahy Packing Co.* v. *Minnesota, supra; United States Express Co.* v. *Minnesota,* 223 U. S. 335, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair."

The above case, *Western Live Stock* v. *Bureau,* 303 U. S. 250, was concerned with the question of whether or not a state privilege tax, measured by the gross receipts received from the sale of advertising space by those engaged in the business of publishing newspapers or magazines, imposed an unconstitutional burden on interstate commerce where the publication was circulated to subscribers within and without the state. The Court sustained the state tax, saying on page 259 of its opinion:

> "Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation, *Utah Light & Power Co.* v. *Pfost, supra; Federal Compress & W. Co.* v. *McLean, supra; Chassaniol* v. *Greenwood,* 291 U. S. 584, and that the value of

> the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellant's circulation of their journal interstate any more than property taxes on railroads are invalid because property value is increased by the circumstance that the railroads do an interstate business."

The Court's opinion in the Western Live Stock case above is predicated to a degree on *American Manufacturing Company* v. *St. Louis,* 250 U. S. 459. Therein the City of St. Louis had levied against manufacturers a license tax as a condition to conducting a manufacturing business in the City, but the tax was based on the amount of sales of the manufactured goods whether sold within the state or without the state. The manufacturer contended that the tax was void as being a direct burden on interstate commerce. The Supreme Court upheld the validity of the tax saying on page 464 of its opinion:

> "In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce."

It may be argued and the Circuit Court of Appeals has made a finding that because the state of destination such as Wisconsin, could levy a compensating or use tax, therefor the state of origin, Illinois, could not levy an occupation or sales tax on these sale transactions. This is the "multiple taxation doctrine" over again. It may first be noted that since the Illinois tax is levied against the *seller* and not the buyer, the levy of a use tax by

the State of destination against the buyer would subject the buyer to only a *single* tax on the transaction. Double or multiple taxation does not exist unless the same tax is levied on the same subject matter within the same jurisdiction. (*Ohio Tax Cases,* 232 U. S. 576, at page 593; *Wright* v. *Louisville and Nashville R. R. Co.,* 195 U. S. 219, at page 222; *Kidd* v. *Alabama,* 188 U. S. 730 at page 732.)

But we are not answering this contention solely on that basis. The question of the "multiple taxation doctrine" is not before the Court in the case at bar. The best answer to this argument was given by Mr. Justice Cardozo in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 587:

> "A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to make them now. *It will be time enough to make them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.*" (Italics ours.)

This was quoted with approval in *Southern Pacific* v. *Gallagher,* 306 U. S. 167, 172:

> "Under the Washington statute, there considered, discrimination against interstate commerce, arising from a second exaction for use after a foreign tax on sale, could not exist as provision was made for a credit against the local tax of any such foreign levy. No such problem arises here by evidence, finding or assignment or error even though the California Act does not have this provision. *It will be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.'*" (Italics ours.)

Consequently the Court need not consider the possibilities that may arise should the state of destination,

such as Wisconsin, impose a use tax on the sales in question.

VII.

The Debtor had made sales of tangible personal property to railroads for use or consumption. In pursuance to the contracts of sale, the Debtor had made delivery of the property to the railroads at their respective Chicago freight stations. It is a fundamental principle of law that the delivery of merchandise by the seller to a common carrier for transportation to the buyer is a sufficient delivery to the buyer to pass title to him. (*Golo Slipper Co.* v. *Hamilton Shoe Stores Co.,* 43 F. (2d) 33, 34; *United States* v. *Hecht,* 11 F. (2d) 128, 135; *In re Arctic Stores,* 258 Fed. 688, 690; *City of Carthage* v. *Duvall,* 202 Ill. 234, 237.)

It is another fundamental principle of law that under a contract of sale f. o. b. the point of shipment, title passes to the buyer at the time of delivery to the carrier. (*Nelson Bros.* v. *Perryman-Burns,* 48 F. (2d) 99, 100; *Higgins* v. *California Prune Growers,* 16 F. (2d) 190, 192; *Hoffman* v. *Gosline,* 172 Fed. 113, 117; *Price* v. *Neiman Bros. Co.,* 240 Ill. App. 157, 162.)

All the contracts entered into between the Debtor and the railroads were f. o. b. Chicago. It is therefore self-evident that title in the property passed to the railroads upon delivery to them at Chicago within the State of Illinois. *In subsequently transporting the property across State lines, the railroads were simply engaged in carrying their own property for their own use.* This transportation was definitely not in interstate commerce. (*Penn. R. R. Co.* v. *Public Utilities Commission,* 298 U. S. 170, 173, 174; *Eastern Air Trans., Inc.* v. *So. Carolina Tax Commission,* 285 U. S. 147, 152; *Superior Oil Company* v.

Mississippi, 280 U. S. 390, 395; *The Pipe Line Cases*, 234 U. S. 548, 561, 562.)

It is not to be denied that these principles of law as to when title passes will not apply where it appears that there was a different intention between the parties. Nor can it be denied that the orders from the railroads to the Debtor and the bills of lading received by the Debtor indicated that in each instance the materials were to be shipped out of the state. *But the form of a document cannot convert an intra-state transaction into an interstate one.* In *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, on pages 394 and 395, the Court said:

> "The document (bill of lading) can hardly affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause.'" (*Browning* v. *Waycross*, 233 U. S. 16, 23.)

All that the Debtor was required to do was to deliver the materials to the Chicago freight stations of the railroads. *The Debtor was not required to, nor did it make delivery of the merchandise across the State lines.* The Debtor paid no freight, nor does it appear that the railroads set up any freight charges on their books or records for these shipments.

There is no dispute concerning the railroad's position in these transactions. As the Debtor's witness, B. B. Melgaard, the Assistant to the Chicago Purchasing Agent for one of the railroads, testified: "We carry our materials to our shops in Milwaukee." (Rec. 47.) In other words, upon delivery of the materials to its Chicago freight station *the railroad acquired title and then shipped its own materials across the State lines* to its shops in

Milwaukee for its own use. While this might be considered interstate transportation, it is not and cannot be confused as being interstate commerce.

VIII.

In its two most recent decisions this Court has sustained the principle that a state tax upon a local activity, such as the selling of merchandise, is to be sustained even though interstate commerce may be involved incidentally to the sales transactions.

The first of these is *Graybar Electric Co.* v. *Curry*, 189 So. 186, 308 U. S. 513. Therein the State of Alabama had levied a sales tax upon the privilege of engaging in the business of selling tangible personal property within the State. A part of the facts indicated that the Electric Company had entered into contracts of sale expressly requiring that certain merchandise should be shipped into Alabama from the State of Ohio in interstate movement. In pursuance to said contracts of sale the Electric Company did cause this merchandise to be shipped into Alabama from the State of Ohio in interstate movement. The question was whether transactions of this type were exempted from the operation of the state sales tax on the ground that they were in interstate commerce.

The Supreme Court of Alabama sustained the state tax on these transactions, saying in its opinion on pages 190, 191:

> "It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were

Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties, by the form of their contract, to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.' *Superior Oil Co.* v. *State of Mississippi ex rel. Rush H. Knox, Attorney General,* 280 U. S. 390-396; *Browning* v. *Waycross,* 233 U. S. 16, 23, 58 L. ed. 828-832, 34 S. Ct. Rep. 578."

A Petition for writ of certiorari was filed in this Court; and on November 6, 1939, on a motion to affirm, the judgment of the Supreme Court of Alabama was affirmed by this Court on the authority of *Banker Bros.* v. *Pennsylvania,* 222 U. S. 210, and *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169.

In *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, the question involved was whether the sales tax of New York City was applicable to certain sale transactions of the respondent, Berwind-White Coal Mining Co. The contract between the buyer and seller required that the coal move in interstate shipment from Pennsylvania to the City of New York; and the coal actually was shipped in such interstate transportation. Yet this Court sustained the New York City sales tax act on these particular sale transactions. The Court's opinion is so relevant in all particulars to the issues involved in the case at bar that it would be futile to even attempt to quote any of its pertinent references. We believe, however, that one of the paragraphs towards the conclusion of the opinion is so fully in point that it is set forth here verbatim:

"The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase

for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

CONCLUSION.

It is respectfully submitted that the case at bar involves the right of the State of Illinois to levy a non-discriminatory state occupation tax against the seller, based on the seller's gross receipts on transactions of sale between residents of Illinois consummated by delivery to the buyers within Illinois. This never has been and cannot be construed as interstate commerce and the state tax is properly applicable thereto.

Wherefore, the Petitioner respectfully submits that the decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the order or decree of the United States District Court for the Northern District of Illinois, Eastern Division, should be reversed.

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